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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

ROBERT C. BROOKS, PETITIONER

v.

MISSOURI PACIFIC RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Robert C. Brooks,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case, entered on October 11, 1962.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Arkansas (App. B, *infra*, p. 26) is not reported. The opinion of the court of appeals (App. A, *infra*, p. 19) is reported at 308 F. 2d 531.

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[1] The government acts on behalf of the petitioner by virtue of Section 9(d) of the Universal Military Training and Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459(d).

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Section 9(c) of the Universal Military Training and Service Act, returning veterans re-employed by their former employers are entitled to be restored only to that status or seniority which, it could be foreseen at the time they went into the service, they would be absolutely certain to achieve.[2]

STATUTE INVOLVED

The pertinent provisions of Section 9 of the Universal Military Training and Service Act (62 Stat. 614, as amended, 50 U.S.C. App. 459) are as follows:

> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within 90 days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than 1 year—
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> * * * * *

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[2] The question presented here is identical to the issue involved in *Donald I. Tilton, et al.* v. *Missouri Pacific Railroad Company*, 306 F. 2d 870 (C.A. 8), No. 664, petition for writ of certiorari filed by the Solicitor General, on behalf of the veterans, on December 14, 1962. Separate petitions are presented because of different factual patterns existing in each case.

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case.

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section shall be considered as having been on furlough or leave of absence during his period of training and service in the Armed Forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within 1 year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

STATEMENT

Petitioner, Robert C. Brooks, was originally employed by respondent, The Missouri Pacific Railroad Company, as an apprentice machinist at the respondent's Monroe, Louisiana, shops on July 5, 1951. The apprenticeship program consisted of a period of 1,040 working days and the preparation of two written papers each month. The collective bargaining agreement provides that, if the apprentice is retained in the railroad's service upon completion of the apprenticeship, his seniority as a journeyman mechanic will date from the time of completion of the apprenticeship, but the evidence adduced at trial indicates that in practice seniority as a mechanic is dated from the date of first employment as a journeyman mechanic (R. 36–37).[1]

Petitioner entered the military service on February 1, 1952. It was stipulated between the parties that if petitioner had not entered the service, but had remained continuously in his civilian employment, he would have completed the apprenticeship period on November 3, 1955. Petitioner was honorably dis-

[1] "R." refers to the printed record in the court of appeals.

charged from the armed forces on November 7, 1953, and was reinstated as an apprentice at Monroe on November 23, 1953. However, the apprenticeship program at Monroe was terminated and petitioner was laid off on April 29, 1954 because of technological changes in the railroad industry.

In response to respondent's system call for apprentice machinists, petitioner transferred to respondent's St. Louis, Missouri, shops on July 6, 1954, where he continued the apprenticeship program. On July 25, 1955, petitioner requested and was granted a transfer to respondent's North Little Rock shops. He thereafter completed his apprenticeship on January 23, 1958, and was immediately employed there as a journeyman machinist. The Railroad, however, established petitioner's seniority as a journeyman at North Little Rock[4] as of the date he actually completed his apprenticeship and began work there as a journeyman. When petitioner protested and asserted that he was entitled to seniority from the date he would have completed his apprenticeship and begun work as a journeyman had he not entered the armed forces, respondent offered him seniority as of that date at its Monroe shops. Petitioner declined this "offer" because there was no work available at Monroe.[5]

[4] It should be noted that, generally, mechanics employed by respondent do not have system-wide seniority, but only have "point seniority," or seniority in the particular shop in which they are employed.

[5] Respondent's offer of retroactive seniority at Monroe was based upon an interpretation of a 1945 Memorandum of Understanding between the Railroad and petitioner's union. This agreement, reaffirmed in 1956, provides that in keeping with the requirements of federal law pertaining to veterans' re-employment rights, an apprentice who has entered military

On the theory that he was entitled under the Universal Military Training and Service Act to be treated as if he had continued in his employment during his military service, petitioner instituted this action in the district court. He sought to compel respondent to accord him seniority as a journeyman at North Little Rock from the date he would have completed the apprenticeship but for his induction into the military service. The district court held that petitioner was entitled to this retroactive seniority at North Little Rock because it found that, if petitioner had not entered the service, but continued his civilian employment and completed his apprenticeship on November 3, 1955, he would have been employed automatically as a journeyman at North Little Rock and would have earned seniority there from that date. This finding was based upon evidence establishing that (App. B, *infra*, p. 38):

> In 1955 there was a shortage of mechanics in the North Little Rock shops, apprentice mechanics were being temporarily upgraded to mechanics' status, and upon the completion of their training as mechanics, they were instantaneously employed as full fledged journeyman mechanics. While it is true that Rule 51 of the 1949 agreement appears to give the railroad some theoretical discretion in the employ-

service and who later is reinstated and completes his apprenticeship will "be given a seniority date as of the date he would have completed his apprenticeship had he remained in the railroad service." (R. 59.) The railroad and the union have interpreted this agreement as requiring only that the veteran be accorded "retroactive seniority" at the shop where he began his apprenticeship, and not where he completed it.

ment of mechanics from the ranks of graduating apprentices, the evidence shows that in practice such discretion had no play, and that transition from the rank of apprentice to the rank of mechanic was automatic.

The court further held that petitioner's right to seniority at North Little Rock under the Act is not affected by the fact that he transferred from Monroe to St. Louis and then to North Little Rock, while he was an apprentice. The court found that petitioner would not in any event have completed his apprenticeship at Monroe because of the lack of work there, and that, prior to November 3, 1955 (the date petitioner would have completed his apprenticeship had he not entered the service), he had actually transferred to North Little Rock. Since petitioner actually was working at North Little Rock on the date that he would have completed his apprenticeship but for his military service, and since he would have been hired automatically as a journeyman at North Little Rock had he completed his apprenticeship on November 3, 1955, the court held that this was the location at which petitioner was entitled to retroactive seniority.[6]

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[6] The court stated (App. B, pp. 40–41):

Having determined that Monroe is not to be considered as plaintiff's retroactive seniority point, it seems clear that such point must be North Little Rock, as plantiff contends. In reaching this conclusion the Court does not speculate on whether had plaintiff not gone into military service he would have moved from Monroe to St. Louis and thence to North Little Rock, as in fact he did following his military service. In a case of this kind a veteran should not be required to prove, and indeed cannot prove, what course his life would have taken but for his military service.

The court of appeals reversed on the basis of its recent decision in *Tilton, et al.* v. *Missouri Pacific R.*, 306 F. 2d 870, petition for a writ of certiorari filed on December 14, 1962, No. 664. In *Tilton*, the Eighth Circuit had ruled that returning veterans are not entitled to the status they would have achieved but for their military service unless, at the time they were inducted, it was predictable with absolute certainty that they would have achieved such status as a matter of right. Applying that standard to the present case, the court below held that petitioner had no such absolute and automatic right to work as a journeyman.

REASONS FOR GRANTING THE WRIT

The ruling of the court below—that returning veterans are not entitled to the status they would have attained but for their military service unless it was predictable with absolute certainty when they left that they would have achieved such status—is in conflict with the basic purpose of the Act. It misapplies the standards enunciated in *McKinney* v. *Missouri-*

Had plantiff not been inducted, he might have tired of railroad work altogether, or he might have shifted to some other line, or applied for a transfer to some point other than North Little Rock.

But it is not speculative to say that in no event would plaintiff have completed his apprenticeship at Monroe, that he did complete it at North Little Rock in 1958, and would have completed it in 1955 but for his military service, and that as of that time he was employed in the North Little Rock shops and would have been hired there automatically as a journeyman mechanic. Had he been so employed at that time, his seniority point would have been fixed at North Little Rock under the actual practice of the railroad and the Union in connection with the initial employment of mechanics. * * *

Kansas-Texas R., 357 U.S. 265, and is inconsistent with other decisions of this Court and of other courts of appeals.[1] In view of these considerations and the obvious importance of this question in the administration of remedial veterans' legislation, the decision should be reviewed by this Court.

1. Section 9 of the Universal Military Training and Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459, carries forward the reemployment provisions of earlier selective service acts which were enacted for the purpose of ensuring that a person inducted into the armed forces would not be penalized or disadvantaged, in the pursuit of his civilian career, as a result of his absence. See, *e.g.*, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284; *McKinney* v. *Missouri-Kansas-Texas R.*, *supra*, 357 U.S. at 270. In keeping with this purpose this Court has ruled repeatedly that, under the Act, the returning veteran is entitled to be restored to the position and status he would have attained as of right had he remained continuously in his civilian employment. *E.g.*, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 284–285; *Oakley* v. *Louisville & N.R.*, 338 U.S. 278, 283. The Court has held, too, that the Act is to be liberally construed. *E.g.*, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 285; *McKinney* v. *Missouri-Kansas-Texas R.*, *supra*, 357 U.S. at 270.

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[1] We here adopt by reference our analysis of the question presented and of the decisions of this Court and of other courts of appeals in the petition for certiorari filed in *Tilton, et al.* v. *Missouri Pacific R.*, No. 664.

It is incontestable that petitioner will suffer a severe disadvantage solely as a result of his military service if his seniority as a journeyman mechanic is computed from the date he actually completed the 1040-day apprenticeship period and began work as a journeyman. Because of petitioner's absence in the armed forces, individuals who began their apprenticeships after he did were able to begin work as journeymen sooner and thereby to jump ahead of petitioner in seniority. Through this advance in seniority, those individuals who remained on the job while petitioner was in the service have obtained decided advantages over petitioner, such as work preference and layoff and recall preference.

On the other hand, had petitioner not entered the service, he would have had a contractual right to complete the apprenticeship period prior to these other apprentices and, as the district court found, he in fact would have been employed automatically as a journeyman at North Little Rock when he did so, thus obtaining a November, 1955, starting date for his seniority as a journeyman machinist. The undisputed evidence showed that upon completion of his apprenticeship an employee becomes a qualified journeyman machinist who has a right to be afforded priority in doing a journeyman's work over any upgraded apprentice doing the same work (R. 35, 50–53). Since there was a shortage of journeyman machinists at North Little Rock during the period in which petitioner would have completed his apprenticeship had he not been serving his country (November 1955), petitioner

would have had a right to be employed immediately as a journeyman machinist unless his employer was willing to forego having the journeyman machinists' work done even by the upgraded apprentices who were then doing it (R. 50–53). On the basis of this evidence the district court found as a fact that it was the practice of the respondent in 1955 to exercise no discretion "in the employment of mechanics from the ranks of graduating apprentices" and that the "transition from the rank of apprentice to the rank of mechanic was automatic" (App. B., p. 38).

2. This Court's precedents establish that petitioner was entitled to retroactive seniority as a journeyman machinist on the basis of the district court's findings that under the contract and practices governing employment of machinists he would have obtained this status by beginning work as a journeyman machinist at North Little Rock on November 3, 1955. *Diehl* v. *Lehigh Valley R.R.*, 348 U.S. 960. Indeed, the plain words of the statute direct that petitioner be accorded "such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." 50 U.S.C. App. 459(c)(2).

The court below, however, rejected the trial court's conclusion that the evidence of record established that petitioner had a right to a November, 1955, seniority date. Relying upon the extremely narrow construction of the statute it had recently adopted in *Tilton, et al.* v. *Missouri Pacific R., supra,* from which we have petitioned for certiorari, No. 664, this Term,

it held that a veteran is not entitled to an advancement in status unless "the promotion in question be automatic * * * as a matter of foresight" (306 F. 2d at 876)—*i.e.*, that it be predictable beyond peradventure at the time the veteran entered the service. Here, the court noted, it could not have been foreseen when petitioner entered the service that the respondent would need more journeyman machinists in November 1955 than it had journeyman applicants. If, contrary to fact, it had had more graduate-apprentice applicants than job openings in November 1955, the respondent could have exercised discretion in selecting journeyman machinists at that date; if, contrary to fact, it had had no job openings for machinists in November 1955, petitioner would not have been employed as a journeyman at that date. The Eighth Circuit held that a right to work as a journeyman machinist and thus obtain machinist seniority in November 1955 which was, as a matter of foresight, subject to such contingencies as these could not be made the basis for statutory seniority rights in light of its interpretation (in the *Tilton* case) of this Court's decision in *McKinney* v. *Missouri-Kansas-Texas R.*, 357 U.S. 265.

As we have shown in our petition for certiorari in *Tilton*, the Eighth Circuit's interpretation of the *McKinney* case is erroneous; indeed, it would largely read out of the statute the so-called "escalator" right (*Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284–285) that Congress intended to provide. The statute requires no predictably certain right to promotion at the time the employee enters the mili-

tary service. This Court has held a veteran entitled to retroactive seniority in a higher status where it was plainly not predictably certain, at the time of entering military service, that the veteran would have enjoyed the higher status had he remained in civilian life. In *Diehl* v. *Lehigh Valley R.R.*, 348 U.S. 960, the employee's right to a promotion depended upon a continued shortage of journeyman carmen during his training period—a contingency indistinguishable from that which the Eighth Circuit has held barred petitioner's statutory rights here—and this Court held the employee entitled to retroactive seniority in the higher position. Similarly, other courts of appeals have rejected the doctrine that a veteran's "escalator" rights to a higher status depend upon a promotion being absolutely predictable at the time of the employee's departure for the military service, although in these cases, too, the right to promotion was contingent upon employment conditions unforeseeable at the time of entering military service.[8]

It is, moreover, clear that this Court's *McKinney* decision did not impose a requirement that the veteran's right to a higher status as a result of continued employment be predictably certain at the time of his

[8] Thus, in *Morris* v. *Chesapeake & Ohio Ry. Co.*, 171 F. 2d 579 (C.A. 7), the court recited the fact that the promotion in question depended upon (1) the occurrence of a vacancy, and (2) the individual's making a bid for the vacancy (171 F. 2d at 579). In *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C.A. D.C.), the court noted that the transfer in question depended upon (1) a need for additional personnel in the higher position, (2) an "election" by the individual for the transfer, and (3) the individual's being "in good standing" in his lower position (177 F. 2d at 857).

departure for military service. In *McKinney*, unlike this case, there was no trial court finding that, at the time the employee would have become eligible for promotion, promotion was entirely automatic. To the contrary, McKinney was claiming the right to a promotion granted in his absence which, this Court stated, was "not dependent simply on seniority" but was "dependent on fitness and ability and the exercise of a discriminating managerial choice" (357 U.S. at 272). The Court went on to point out (*ibid.*):

> Petitioner was not entitled to a group 1 position simply because in his absence it had been bulletined, and if he had then been employed he might have applied for it, and respondent might have found that he possessed the requisite fitness and ability. The statute does not envisage overriding an employer's discretionary choice by any such mandatory promotion. * * *

The Court concluded that, where management had reserved the discretion to have promotions depend upon "fitness and ability," the employee could scarcely be considered as entitled to a promotion "as of right."

It is clear from a reading of the Court's opinion in the *McKinney* case that it ruled against the veteran solely because of the reservation of a meaningful managerial discretion in the promotion process. The Court was evidently influenced both by the practical difficulty of determining, even as a matter of hindsight, what the employer's choice among several eligible employees would have been and by the undesirability of interfering with an employer's retained

discretion in awarding higher positions. These considerations obviously have no application to a case such as this where the district court has found as a fact that, at the time petitioner would have become eligible for work as a journeyman mechanic, the respondent exercised no discretion in the employment of mechanics from the ranks of graduating apprentices and where the evidence indicates that at the relevant period petitioner would have had a right to employment as a journeyman prior to the rights of those apprentices then performing the work of machinists.

The inapplicability of *McKinney* to the facts of this case is, indeed, conclusively demonstrated by the fact that the Court remanded the *McKinney* case to give the veteran the opportunity to prove (as he had argued) that, notwithstanding his employer's apparent reservation of discretion, in fact by custom and practice he, as the senior union bidder for the higher position, would necessarily have obtained it. The same lack of original foreseeability as to the labor conditions that would develop while the veteran was in the service was present there as here. In *McKinney*, as here, it could not have been predicted with certainty when the employee entered the service that a higher position would become available and that he would be the senior man bidding for the position. If the Court had believed that such circumstances could affect the "automatic" character of a promotion, there would have been no point in its remanding the case to the trial court for evidence concerning custom and practice.

It is thus clear that, in requiring that the attainment of a genuinely automatic promotion be predictable with absolute certainty at the time the employee enters the military service, the court below seriously misread this Court's decision in *McKinney*. And its reading would, we submit, render the "escalator" rights bestowed on veterans by the Act largely meaningless. It is difficult to imagine a case where, at the time the veteran entered the service, it could be predicted with absolute certainty that all of the conditions necessary to his attaining a promotion would later occur. The variables cited by the Eighth Circuit in *Tilton* and the instant case will be present in most cases—the possibility, for example, that the veteran might have been laid off or fired before the promotion became available, or that he would not accept a promotion to which he was automatically entitled, or, as in the *Diehl* case, that a shortage of qualified journeymen would not continue. To these could be added any number of other "variables"—for example, that the higher position might never have become available or might have been eliminated by the employer's going out of business or merging with another company (cf. *Trailmobile Co.* v. *Whirls*, 331 U.S. 40). If the veteran's "escalator" right depends upon such wide-ranging speculation, it is an empty right indeed.*

* As the trial court held (App. B, pp. 39-41), the fact that petitioner transferred from Monroe to St. Louis, and then to

3. The decision below would adversely affect a very substantial number of veterans whom Congress intended to protect through the "escalator" reemployment rights guaranteed by the Act. The apprenticeship program of the respondent in this case is comparable to those in effect on many other railroads and in many other industries having hundreds of thousands of workers. With the continued draft of young men into the armed forces, the problems presented in this case will recur time and again. Moreover, the spread of automation magnifies the importance of

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North Little Rock, does not affect his right to retroactive seniority under the Act. First, it should be noted that, because of technological advances in the industry, petitioner would not have completed his apprenticeship at Monroe even if he had not entered the armed forces. Moreover, he actually transferred to North Little Rock, and was employed as an apprentice there, on the date that he would have completed his apprenticeship but for his military service. Second, the fact that petitioner transferred while he was an apprentice is not relevant to a determination of the seniority right which he claims. For, by the terms of the collective bargaining agreement, an employee begins to earn seniority as a journeyman only after he completes his apprenticeship. Finally, even had petitioner not transferred to North Little Rock but had completed his apprenticeship at some other point, he still would have had a right to be employed at North Little Rock on November 3, 1955. At that time, the Railroad had upgraded apprentices working as journeymen at Monroe, and the evidence indicates that an apprentice who graduated at any point had a right to "bump" an upgraded apprentice at any other point. See pages 30, 50, 52 of the Record in the court below.

seniority and gives the issue added importance for the future.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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JANUARY 1963.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 17,019

MISSOURI PACIFIC RAILROAD COMPANY, APPELLANT, *v.* ROBERT C. BROOKS, APPELLEE

[October 11, 1962]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

Before VOGEL and VAN OOSTERHOUT, Circuit Judges, and VAN PELT, District Judge.

VAN OOSTERHOUT, Circuit Judge.

Plaintiff Brooks, a veteran, brought this action under the Universal Military Training and Service Act of June 24, 1948, 50 U.S.C.A. § 459, to establish retroactive seniority rights as a machinist at defendant's North Little Rock shops. The trial court upheld plaintiff's contention and granted him retroactive seniority. This timely appeal by defendant followed.

Brooks entered into defendant's employment as an apprentice machinist at its Monroe, Louisiana, shops on July 5, 1951, continuing in such capacity until his induction into military service on January 24, 1952. He was honorably discharged on November 7, 1953, and upon his application he was restored to duty as an apprentice machinist at Monroe on November 23,

1953. On April 29, 1954, Brooks was laid off due to a reduction in work force. On July 6, 1954, he resumed his apprenticeship at defendant's shops at St. Louis, Missouri, where he remained until July 25, 1955, when upon his request he was granted a transfer to defendant's North Little Rock shops. Plaintiff completed the required 1040 days of apprenticeship at the North Little Rock shops on January 23, 1958, and was immediately thereafter employed as a journeyman machinist and was assigned his seniority as such at North Little Rock on January 23, 1958. Plaintiff was offered a retroactive seniority date of November 3, 1955, at Monroe upon the basis of defendant's interpretation of a 1945 memorandum of understanding between defendant and the union.[1]

Under the basic contract between the defendant and the union, an employee, subject to certain exceptions not here applicable, obtained seniority only at the point of his employment. Plaintiff rejected the offer of seniority at Monroe as there was no employment opportunity available there because of work changes brought about by the transition from steam to diesel locomotives.

The parties stipulated that *if* Brooks is entitled to retroactive seniority as a journeyman machinist at North Little Rock, the date would be November 3, 1955. Defendant made clear that the emphasis is on

[1] Plaintiff in his original complaint had asserted rights upon the basis of a 1945 memorandum of understanding between defendant and the union. After defendant had filed a motion to dismiss upon the ground that the court had no jurisdiction to grant relief beyond that founded upon the statute, Brooks, by amendment specifically stating his intention so to do, withdrew the assertion of his complaint based upon the 1945 memorandum. The trial court held such issue was withdrawn and plaintiff has taken no appeal from such holding, nor has he asserted error with respect thereto in his brief.

the word "*if*" and that it was denying Brooks had any right to retroactive seniority at North Little Rock. The applicable 1949 contract between the defendant and the union, of which plaintiff was a member, required an apprentice mechanic to serve in such capacity for 1040 days and in addition to satisfactorily complete a correspondence course furnished by the defendant. Such course consisted of two lessons per month. An examination was required as to each lesson. The passing grade was 75%.

Plaintiff concedes that actual service of 1040 days as an apprentice is a prerequisite to his attaining journeyman status. His contention is that since he actually served such apprenticeship period and had attained journeyman status, his seniority date should be made retroactive to the date he would have completed his apprenticeship but for his military service.

Thus, the basic issue here presented is the same as the issue we considered in *Tilton* v. *Missouri Pacific R.R.*, 8 Cir., — F. 2d — (decided August 17, 1962), namely, whether in situations where an apprentice period is required for the development of proficiency and is required to be actually served, a claimant whose apprenticeship is interrupted by military service is entitled upon the completion of the service of his apprenticeship after his return from military service to have his seniority date as a journeyman accelerated to an earlier date.

Tilton sets out the pertinent provisions of the Act and analyzes the cases treating the problem here under consideration. No purpose would be served in attempting to retread the ground so well covered by Judge Blackmun in that case. We adhere to the view of the law there stated. The apprentice carman involved in *Tilton* and the apprentice machinist here involved are covered by the same general contract be-

tween the same railroad and the same union. The apprentice rules relating to carmen and machinists differ in no material respect. The application of the law as stated in *Tilton* to the issues and facts here presented compel a reversal. In fairness to the able trial court, it should be observed that *Tilton* was decided subsequent to the trial court's decision in this case.

In *Tilton* we concluded that retroactive seniority could be granted only when the claimant would be promoted automatically or by reason of mere passage of time. We held "if the claimant's promotion is not certain (as is the case where comparative ability, physical condition, age, employer's discretion, and the like, are factors) but is only probable—even highly probable—retroactive seniority is withheld."

In support of this principle, we relied upon and quoted from *McKinney* v. *Missouri-Kansas-Texas R.R.*, 357 U.S. 265, and *Sularz* v. *Minneapolis, St. Paul & Sault Ste. Marie R.R.*, 8 Cir., 259 F. 2d 122, as well as other cited cases.

Full consideration was given to *Diehl* v. *Lehigh Valley R.R.*, 348 U.S. 960, and *Oakley* v. *Louisville & Nashville R.R.*, 338 U.S. 278, relied upon here by plaintiff. In *Tilton*, the reasons why advancement was not automatic are set forth in the opinion. Such reasoning is persuasive here.

The trial court in effect found that progression from apprentice to journeyman mechanic is not automatic, stating:

> "In contending that plaintiff had no retroactive seniority rights under the Act and apart from the 1945 memorandum, the railroad's contention is simply that apprentices in the railroad industry are not entitled to such seniority

> because they have no automatic right to be employed as journeyman mechanics upon the completion of their training, and that the selection of particular journeymen out of a group of graduate apprentices involves the exercise of managerial judgment and discretion and may also involve additional factors other than the fact that given apprentices may have completed apprentice training.
>
> "It may be conceded that in many instances the transition of an apprentice from his apprenticeship to employment as a journeyman craftsman depends on more than lapse of time and the completion of a course of instruction so that it cannot be said that had the apprentice in question not been called into military service he would automatically have acquired journeyman status at a time earlier than that at which he actually completed his training and was in fact employed as a journeyman. And it is clear that in such cases the Act does not require the employer to accord retroactive seniority, even though it may have been 'highly probable' that the status in question would have been acquired at a time earlier than it was."

The trial court, upon the basis of substantial evidence that there was a shortage of journeymen mechanics at North Little Rock in 1955 and that apprentice mechanics upon completing their apprenticeship were generally immediately employed as journeymen, states:

> "While it is true that Rule 51 of the 1949 agreement appears to give the railroad some theoretical discretion in the employment of mechanics from the ranks of graduating apprentices, the evidence shows that in practice such discretion had no play, and that transition from the rank of apprentice to the rank of mechanic was automatic."

While we accept the trial court's findings as to the shortage of mechanics in North Little Rock in 1955, and the resulting consequence that by reason thereof graduate apprentices were readily employed, we find no support in such finding for a conclusion that the apprentice's right to advancement is automatic. The balance between supply and demand of a particular category of workmen at a designated point at a future date cannot be foreseen or predicted with any degree of certainty. This is illustrated by the fact that there was a surplus of mechanics in November of 1955 at the Monroe shops. In our view, the fact that the railroad may have exercised its discretion liberally in instances where labor shortages existed does not foreclose its right to exercise its discretionary powers provided by the contract in the employment of journeymen.

Plaintiff in his brief correctly states, "an apprentice begins to earn seniority as a journeyman only after he completes his training and begins work as a journeyman." There is no contract rule which compels defendant to employ any particular graduate apprentice as a journeyman upon the completion of his apprenticeship.

In *Tilton*, in answer to an argument similar to that here made, we stated:

> "Their argument, as already indicated, is that, despite the uncertainties which concededly existed at the time of their entry into military service, their return to work and their completion of the work period dispelled those uncertainties and rendered them unfounded in fact. Therefore, it is said, since the work period has been completed and they have elected carman's seniority, it follows that, but for the military service, the plaintiffs would necessarily have achieved the higher status just ahead of their

next junior upgraded helpers. Unfortunately, from the plaintiffs' viewpoint, there appears to be little or no effective supporting authority among the numerous cases interpreting the Act."

Upon the basis of the standard set for determining the right to retroactive seniority in the *Tilton* and *McKinney* cases, we find no substantial evidence to support a finding that plaintiff's progression from apprentice machinist to machinist is automatic. Hence, the court erred in according plaintiff retroactive seniority as a journeyman machinist at its North Little Rock shops.

Defendant, relying upon *Horton* v. *United States Steel Corp.*, 5 Cir. 286 F. 2d 710, as an additional basis for reversal, states that the automatic standard applies to transfers such as Brooks' transfer upon his request from the St. Louis shops to the North Little Rock shops. Since we have already determined that Brooks' right to promotion was not automatic, we deem it unnecessary to pass upon such contention.

The judgment appealed from is reversed and remanded with directions to dismiss the complaint.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

Memorandum Opinion

(Filed in United States District Court December 18, 1961)

Plaintiff, Robert C. Brooks, has brought this action against the defendant, Missouri Pacific Railroad Company, to enforce certain claimed retroactive seniority rights as a machinist in the employ of defendant. Plaintiff's claim is based upon the re-employment provisions of the Universal Military Training & Service Act, 50 U.S.C.A., § 459, as amended,[1] and upon the collective bargaining agreement in force at all pertinent times between the railroad and System Federation No. 2, Railway Employees' Department, A.F. of

[1] Insofar as here pertinent section 459(a) and 459(b)(B)(i) provide in substance that where an employee of a private employer is inducted into the armed services and satisfactorily completes his period of training and service, and receives a certificate to that effect, such employee is entitled to re-employment, provided that he is still qualified to perform the duties of his employment and makes timely application for such re-employment. The re-instatement of such employee shall be to the same position held by him formerly or to some other position with "like seniority, status and pay." Further, any person who is so restored to his former position shall be deemed to have been on furlough or leave of absence during the period of his military training and service, and his restoration shall be without loss of seniority. 50 U.S.C.A. App. §459(c)(1). Section 459(d) vests jurisdiction in the district courts of the United States to entertain suits brought to enforce re-employment rights of returned service men, and provides that the United States Attorneys may represent them in such suits. Plaintiff has such representation in this case.

L. The cause has been tried to the Court and submitted on written briefs. This memorandum incorporates the Court's findings of fact and conclusions of law.

On July 5, 1951, plaintiff was employed by defendant as an apprentice machinist at its Monroe, Louisiana, shops. The apprentice working course is normally completed in 1040 working days, and in addition an apprentice is required to complete satisfactorily a correspondence course furnished by defendant.

At the time of plaintiff's employment there was in effect between the railroad and the Union a collective bargaining agreement which had become effective on September 1, 1949, and which apparently superseded an earlier agreement. Rule 37 of the agreement in force at the time plaintiff was hired provided that the ratio of apprentices in their respective crafts should not be more than one apprentice to every five machinists; and that if within the "first period of training" [2] an apprentice showed no aptitude for the trade, he would not be retained in employment, but that an apprentice should not be dismissed from service during his apprenticeship without just cause. Rule 37(e) provided specifically that if an employee was retained in service after completing his apprenticeship, his seniority rights as a mechanic would date from the time of the completion of the apprenticeship.

Prior to plaintiff's employment and in December, 1945, when the problem of veteran's re-employment rights had become urgent, the railroad and the Union had entered into a "Memorandum of Understanding" which recognized that under the law an employee returning from military service would be entitled to be restored to the position to which his accumulated se-

[2] The materials before the Court indicate that the 1040 days of apprenticeship were divided into eight training periods of 130 days each.

niority, including time spent in military service, would have entitled him and which he would have occupied had he not gone into service. With specific reference to apprentices, this memorandum provided that one who entered the military service and resumed his apprenticeship upon completion of that service would be accorded seniority as of the date upon which the apprenticeship would have been completed had the apprentice remained continuously in the railroad's service.

Before completing his apprenticeship plaintiff was inducted into the military service on January 24, 1942. He was honorably discharged on November 11, 1953, thereafter applied for re-instatement as an apprentice, and was restored to duty at Monroe on November 23, 1953.

On April 29, 1954, plaintiff was laid off due to a reduction in force at Monroe. On July 6, 1954, plaintiff was called by defendant to work as an apprentice[3] in its St. Louis shops, where he continued his training until July, 1955, when he was transferred, at his own request, to defendant's North Little Rock shops. Plaintiff completed his training as an apprentice on January 23, 1958, and he was immediately hired as a journeyman mechanic or machinist at North Little Rock.

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[3] Rule 21(e) of the collective bargaining agreement provided that in connection with reductions in force the ratio of apprentices would be maintained. Rule 23 provided that men laid off by reason of reduction in force should be given preference for work available in other shops, and the right to transfer to such shops with the privilege of returning to their home stations when forces at such stations should be increased. It was further provided that upon such a transfer the employee involved would establish seniority at the transfer point, but that such seniority at that point would end when the employee was released from employment at the transfer point.

The record discloses that mechanics in the employ of the defendant do not have system-wide seniority. Rather, such an employee has seniority in one particular shop, a system that is called "point seniority."[4] Due to the shift by the railroads in recent years from steam to diesel powered locomotives, which latter type locomotives require less maintenance and service than the former, defendant's need for mechanics has been reduced very drastically and more so in some shops than in others. Hence, a mechanic's point of seniority can be as important as his seniority date or even more so. It is the importance of the point of seniority to a mechanic which has given rise to the instant controversy.

It will have been observed that while Rule 37(e), as it appeared in the 1949 agreement, provided that a mechanic's seniority as such should begin upon the completion of his apprenticeship, said rule had nothing to say about the mechanic's point of seniority. Probably in 1949, and indeed for some years thereafter, there was no real need for the contract to deal specifically with points of seniority because normally an apprentice would complete his training in the same shop in which he began it and would be employed in that shop; thus fixing his initial seniority point. Therefore, it can be said that from a practical standpoint a machinist's initial point of seniority was the shop in which he completed his training. In 1956, while plaintiff was employed at North Little Rock, the text of Rule 37(e) was amended so as to provide

[4] In this opinion the Court will have occasion to use the phrases "seniority point" or "point of seniority." Those phrases refer to the particular shop in which a given employee has seniority at a given time. Ordinarily, and subject to certain qualifications not here material, an employee who transfers from one shop to another loses seniority in the shop from which he transfers.

that an apprentice's seniority as a machinist would be as of the date of the completion of his training and in the shop in which he was employed when his training was completed. In connection with the 1956 amendment to Rule 37(e) it was specifically recognized that the 1945 memorandum of understanding, which has been mentioned, was to remain in full force and effect and was not modified by the amendment.

Although the amendment to Rule 37(e) spelled out a mechanic's initial point of seniority, and although that amendment referred to the 1945 memorandum which accorded retroactive seniority to apprentices returning from military service, the amendment for some reason was silent as to whether such an apprentice's seniority in the shop where he completed his training would be retroactive in that shop. The failure of the railroad and the Union to deal specifically with the problem of the seniority point of apprentices who have completed their training after a period of military service and who are entitled to retroaction seniority under the 1945 understanding has in instances created problems with which the railroad and Union have undertaken to deal by construing the collective bargaining agreement, including the 1945 understanding and the 1956 amendment to Rule 37(e), to mean that an apprentice so situated is to be given either retroactive seniority in the shop where he commenced his training, regardless of where he completed it, or non-retroactive seniority in the shop where he completed his training, regardless of where he commenced it. This construction causes no difficulty where the apprentice in question upon his return from service completes his training in the same shop in which he was first employed, but it can cause difficulty where the apprentice starts his training in one shop and completes it in another, and where the sec-

ond shop is a more advantageous seniority point than the first.

When plaintiff completed his apprenticeship and was hired as a mechanic in 1958, the railroad accorded him seniority as of that date in the North Little Rock shops. This was in accord with Rule 37(e) as amended, but without regard to any retroactive seniority. While plaintiff accepted the employment at North Little Rock and has worked in the shop there since that time, he protested the fact that he had not been allowed retroaction seniority. The railroad thereupon indicated a willingness to allow him such seniority but with Monroe as his seniority point. Plaintiff refused to accept that proposition since even with retroactive seniority he would not be able to work in the Monroe shop at this time and perhaps not for a number of years. The railroad's willingness to grant plaintiff retroactive seniority at Monroe appears to have been in accord with the construction which the railroad and the Union have placed upon the overall collective bargaining agreement.

Affairs having come to this state, the plaintiff commenced this action. It is the theory of plaintiff that he is entitled to retroactive seniority at North Little Rock, whereas defendant takes the position that if plaintiff is to have any retroactive seniority it must be at Monroe. It has been conceded that whether plaintiff's retroactive seniority point be North Little Rock or whether it be Monroe, his retroactive seniority date is November 3, 1955, which is the date upon which he would have completed his apprenticeship had he not been called into military service.

In resisting the claim of plaintiff, defendant attacks both the jurisdiction of the Court and the merits of the claim. It is asserted by the railroad that as far as the Act is concerned the only right that plaintiff

had upon his return to civilian life was to be restored to his position as an apprentice and given an opportunity to complete his training, whereupon, if he should be employed by defendant as a mechanic, he would get seniority as such in the shop where the training was completed and as of the date of the completion. And the defendant argues that when plaintiff was put back to work as an apprentice and when he actually completed his course of training in 1958 and was hired in the North Little Rock shop and was given seniority as of the date of the completion of his training, plaintiff received everything that the Act required.'

While defendant recognizes that plaintiff was entitled to retroactive seniority under the 1945 memorandum of understanding, it contends that the provision of that memorandum which gave returning apprentices retroactive seniority went further than was required by the statute, and that when plaintiff seeks to enforce those rights he is not suing under the statute but on a contract which gives him rights greater than those which the Act accords. From this premise defendant argues that since to grant plaintiff relief would require the Court to construe and apply a railroad collective bargaining agreement, the controversy is within the exclusive jurisdiction of the National Railway Adjustment Board created by section 3 of the Railway Labor Act, 45 U.S.C.A., § 153, and is beyond the jurisdiction of the Court.[8] See *Slocum* v. *Delaware L. & W.R. Co.*, 339 U.S. 239.

On the merits, defendant repeats its contentions that under the Act plaintiff is not entitled to retro-

[8] This jurisdictional contention and the further contention that the complaint fails to state a claim upon which relief can be granted were first raised by motion to dismiss, on which motion the Court reserved its ruling.

active seniority at North Little Rock or at any other place, and that as far as the 1945 agreement is concerned, plaintiff is bound by the construction adopted by the railroad and the Union with respect to the overall collective bargaining agreement, including the 1945 memorandum, the 1949 printed contract, and the 1956 amendment to Rule 37(e) of the 1949 agreement, under which construction plaintiff has a choice of having North Little Rock as a seniority point with a non-retroactive seniority date of November 23, 1958, or having Monroe as a seniority point with seniority retroactive to November 3, 1955.

Before discussing further the contentions of the parties it is well to point out what the reemployment provisions of the Act do and what they do not do. The purpose of section 459 is succinctly stated in subsection (c)(2) thereof:

> "It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) (of this section) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

Subsection (c)(2) has been construed frequently by the Courts. As so construed, it means that the returning veteran upon restoration to his job is to enjoy such status, pay, seniority, and promotions as would have accrued to him automatically had his employment not been interrupted by military service. No agreement between any employer and any collective bargaining agent nor any interpretation or application of an existing collective bargaining agreement

which infringes upon the reemployment rights granted by the statute, or which discriminates against returning veterans, can be permitted to stand. On the other hand, the statute, while to be construed liberally, does not entitle a returning veteran to benefits or to status which he would not have enjoyed or received automatically had he remained constantly on the job. The veteran is not entitled to a windfall because he is a veteran, or to better treatment or more benefits than he would have received had he not gone into the service. And, as indicated, the veteran must show that the status or seniority which he seeks under the Act would have accrued to him automatically had he remained in private employment. It is not sufficient for him to show merely that there was "high probability" that he would have obtained the status or seniority sought had it not been for his military service. *McKinney* v. *Missouri, K. & T. R. Co.*, 357 U.S. 265; *Diehl* v. *Lehigh Valley R. Co.*, 348 U.S. 960; *Oakley* v. *Louisville & Nashville R. Co.*, 338 U.S. 278; *Fishgold* v. *Sullivan Drydock & Repair Corporation*, 328 U.S. 275; *O'Hare* v. *United States*, Ct. Cl., 288 F. 2d 705; *Horton* v. *United States Steel Corporation*, 5 Cir., 286 F. 2d 710; *Rix* v. *Turnbull-Novak, Inc.*, 8 Cir., 160 F. 2d 785; *Sularz* v. *Minneapolis, St. Paul & Sault Ste. Marie R. Co.*, 8 Cir. 259 F. 2d 122; *Bassett* v. *Texas & Pacific R. Co.*, 5 Cir., 258 F. 2d 819.

I

Concerning the challenge to the Court's jurisdiction, it is clear that to the extent that a railroad employee seeks to enforce rights guaranteed to him under the Act the federal courts have jurisdiction, notwithstanding the fact that to afford relief may require such courts to construe and apply a railroad collective bargaining agreement. In such a case there

is no need for the employee to exhaust possible remedies available to him under the Railway Labor Act. *McKinney* v. *Missouri, Kansas & Texas R. Co., supra.*

On the other hand, the Court is willing to assume, for present purposes at least, that where the collective bargaining agreement grants to a returning veteran more rights than the Act itself accords him, an action brought by the veteran to enforce such additional rights may be considered as not "founded upon the statute", but to be: "based upon the contract," and thus perhaps beyond the jurisdiction of the Court.[6]

If, as defendant contends, the 1945 memorandum of understanding confers upon returning apprentices contractual rights over and above those granted by the underlying collective bargaining agreements, which rights the statute authorizes the federal courts to enforce, and over above those which the statute

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[6] Making jurisdiction depend upon the characterization of an action like this as "founded on the statute" on the one hand or "based upon the contract," on the other hand, creates some difficulty which is at least in part semantic. The difficulty arises from the fact that seniority, whether in the railroad industry or in some other industry, is essentially contractual, and the rights asserted under the Act must have their origin in a collective bargaining agreement. Hence, any suit to establish seniority rights is, in a sense, "based on" the underlying contract because in the absence of such a contract no such rights exist. In this connection it was pointed out in *McKinney* that the Act itself creates no rights of seniority and no seniority system. It simply recognizes such rights and systems as may exist by virtue of prior agreements, and requires an employer to restore a returned veteran to his employment and to grant such seniority under the agreement as he would have had but for his military service. But, *McKinney* holds that a veteran suing to enforce his reemployment rights, including seniority, is doing more than merely suing on the contract. When he brings his action he asserts "special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the armed forces." (357 U.S. at p. 269).

confers, and if plaintiff is basing his claim on the 1945 memorandum, then defendant's jurisdictional plea might well be meritorious. Cf. *Delman* v. *Federal Products Corporation,* 1 Cir., 251 F. 2d 123. However, it does not appear that plaintiff now relies on the 1945 memorandum as giving him some special rights which he would not have had in the absence of such memorandum. In fact, when plaintiff amended his complaint, he deleted all reference to said memorandum and stated that one of the purposes of the amendment was to make such deletion. Hence, while plaintiff claims that he is entitled to what the 1945 memorandum says he is entitled to have, it now appears that he bases that claim on the statute, as applied to the basic collective bargaining agreement establishing a seniority system and seniority rights, and contends that under the Act defendant is required to give him retroactive seniority at North Little Rock.

With the case in this posture, the Court holds that it has jurisdiction of the cause, and defendant's plea to the contrary will be rejected.

With the jurisdictional question thus disposed of, the case, on the merits, presents two questions: (1) whether under the Act plaintiff is entitled to retroactive seniority to be measured in point of time from the date he would have completed his apprenticeship but for his military service; (2) If so, then is plaintiff entitled to retroactive seniority at North Little Rock? Putting the second question in slightly different language, does the construction which has been adopted by the railroad and the Union which would deny plaintiff retroactive seniority at North Little Rock, while offering it to him at Monroe, violate plaintiff's rights under the Act?

II

In contending that plaintiff had no retroactive seniority rights under the Act and apart from the 1945 memorandum, the railroad's contention is simply that apprentices in the railroad industry are not entitled to such seniority because they have no automatic right to be employed as journeyman mechanics upon the completion of their training, and that the selection of particular journeymen out of a group of graduate apprentices involves the exercise of managerial judgment and discretion and may also involve additional factors other than the fact that given apprentices may have completed apprentice training.

It may be conceded that in many instances the transition of an apprentice from his apprenticeship to employment as a journeyman craftsman depends on more than lapse of time and the completion of a course of instruction so that it cannot be said that had the apprentice in question not been called into military service he would automatically have acquired journeyman status at a time earlier than that at which he actually completed his training and was in fact employed as a journeyman. And it is clear that in such cases the Act does not require the employer to accord retroactive seniority, even though it may have been "highly probable" that the status in question would have been acquired at a time earlier than it was. *McKinney* v. *Missouri, Kansas & Texas R. Co., supra; Sularz* v. *Minneapolis, St. Paul & Sault Ste. Marie R. Co., supra; Bassett* v. *Texas & Pacific R. Co., supra; Addison* v. *Tennessee Coal, Iron & Railroad Co.*, 5 Cir., 204 F. 2d 340. See also the unreported opinions of the United States District Court for the Eastern Division of the Eastern District of

Missouri in the cases of *Cross* v. *Thompson, Trustee*, Docket No. 8083(3), decided in 1954, and *Tilton et al.* v. *Missouri Pacific R. Co.*, Docket Nos. 59C 301(2), 59C 302(2), and 59C 303(2), decided in 1959.

Although defendant earnestly contends that the authorities just cited govern and establish that plaintiff is not entitled to retroactive seniority under the Act, the record here discloses that plaintiff had a contractual right under the basic agreement to complete his apprenticeship, that he would have completed the same in 1955 had he not been called into military service, and that had he completed it at that time he would, in point of practice, have been hired automatically as a journeyman machinist with seniority as of the date of completion of his apprenticeship. In 1955 there was a shortage of mechanics in the North Little Rock shops, apprentice mechanics were being temporarily upgraded to mechanics' status, and upon the completion of their training as mechanics, they were instantaneously employed as full fledged journeyman mechanics. While it is true that Rule 51 of the 1949 agreement appears to give the railroad some theoretical discretion in the employment of mechanics from the ranks of graduating apprentices, the evidence shows that in practice such discretion had no play, and that transition from the rank of apprentice to the rank of mechanic was automatic.

In the Court's view the factual elements present in the instant case serve to distinguish it from the cases relied upon by the defendant, and the Court holds that in the circumstances defendant was required to grant retroactive seniority to plaintiff when he completed his training and was employed as a mechanic. Cf. *McNichols* v. *Southern Railway Co.*, E.D. Ky., 194 F. Supp. 148.

III

There remains for consideration the question of whether plaintiff is entitled to retroactive seniority at North Little Rock. In arguing that he is not so entitled the railroad contends that the collective bargaining agreement is ambiguous as to retroactive seniority points, and that the construction placed upon the agreement by the railroad and the Union is permissible and binding upon plaintiff. It is further argued that it has not been established with the requisite certainty that plaintiff would have completed his apprenticeship in North Little Rock had he not been required to enter the armed forces.

The construction of the agreement invoked by the railroad gives the Court no problem as it applies to cases in which the apprentices in question would have completed their training in the same shops where such training was begun, which is the normal course of events. In such a case the returned service man gets exactly the same seniority date and exactly the same seniority point as he would have obtained had he remained constantly on the job throughout his apprenticeship. The Act does not entitle an apprentice to a more advantageous point of seniority than he would have had had he never entered the military service, or because he completed his training in a busier shop than the one in which he was employed prior to his service and in which he would ordinarily have completed his training had he been left undisturbed.

However, this is not such a case. In no event would plaintiff have completed his training at Monroe. The parties have agreed that plaintiff's retroactive seniority date is November 3, 1955, and long before that time plaintiff had been cut off at Monroe and would

have been cut off there even if he had not gone into service. He would have been required to complete his training in some other shop, and on November 3, 1955, when training would have been completed plaintiff actually was employed at North Little Rock.

In such circumstances the attempt of the defendant and the Union to fix plaintiff's retroactive seniority at Monroe clearly violates the Act since it does not restore plaintiff to the same status in point of seniority he would have occupied but for his military service. Indeed, seniority at Monroe would be entirely unrealistic, and in fact meaningless, since there has been no work for plaintiff at Monroe at any time subsequent to his lay-off there in 1954.

Having determined that Monroe is not to be considered as plaintiff's retroactive seniority point, it seems clear that such point must be North Little Rock, as plaintiff contends. In reaching this conclusion the Court does not speculate on whether had plaintiff not gone into military service he would have moved from Monroe to St. Louis and thence to North Little Rock, as in fact he did following his military service. In a case of this kind a veteran should not be required to prove, and indeed cannot prove, what course his life would have taken but for his military service. Had plaintiff not been inducted, he might have tired of railroad work altogether, or he might have shifted to some other line, or applied for a transfer to some point other than North Little Rock.

But it is not speculative to say that in no event would plaintiff have completed his apprenticeship at Monroe, that he did complete it at North Little Rock in 1958, and would have completed it in 1955 but for his military service, and that as of that time he was employed in the North Little Rock shops and would have been hired there automatically as a journeyman

mechanic. Had he been so employed at that time, his seniority point would have been fixed at North Little Rock under the actual practice of the railroad and the Union in connection with the initial employment of mechanics. Since the Court has concluded that under the Act plaintiff is entitled to retroactive seniority, it follows in the circumstances that his retroactive seniority point should be at North Little Rock. See *McNichols* v. *Southern Railway Co.*, E.D. Ky., *supra*. In so holding the Court believes it is awarding plaintiff nothing to which he is not entitled under the Act. To hold otherwise would be to give him substantially less than the Act requires and would be, in fact, to give him nothing.

Judgment will be entered directing the defendant to accord plaintiff a retroactive seniority date of November 3, 1955, and fix his retroactive seniority point at North Little Rock. Counsel for plaintiff may submit a precedent for judgment after first obtaining opposing counsel's approval as to form and verbiage.

Dated this 18 day of December, 1961.

/s/ J. SMITH HENLEY,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1963